Supreme Court, U.S.
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(2)

No. 98-1849

In The

Supreme Court of the United States

MARK MCCLAIN,

Petitioner,

v.

RICHARD C. SCHARRER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the District Court properly dismiss Petitioner's complaint for lack of jurisdiction?

2. Did the District Court properly dismiss Petitioner's complaint after affording Petitioner numerous opportunities to state an actionable claim?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Mark McClain, Richard C. Scharrer, James L. Jacobson and Pickrel, Schaeffer & Ebeling.

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There are no parent companies or non-wholly owned subsidiaries to any of these entities.

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CITATIONS OF OPINIONS ENTERED IN THIS CASE

In the United States District Court for the Southern District of Ohio,

Western Division at Dayton

McClain v. Scharrer (May 26, 1998) Case No. C-3-98-182, Report and Recommendations, unreported, reprinted at App. 2.

McClain v. Scharrer (Sept. 8, 1998) Case No. C-3-182, Decision and Order Denying Plaintiff's Objections, unreported, reprinted at App. 7.

McClain v. Scharrer (Sept. 17, 1998) Case No. C-3-98-182, Order Denying Second Motion for Relief from Judgment, unreported, reprinted at App. 11.

STATEMENT OF BASIS FOR JURISDICTION

The Decision and Order dismissing this case was entered by the United States District Court for the Southern District of Ohio, Western Division at Dayton, on July 15, 1998. An appeal was then taken out of time to the United States Court of Appeals for the Sixth Circuit on October 5, 1998. On December 21, 1998, the Sixth Circuit Court of Appeals dismissed Petitioner's appeal as untimely. Petitioner filed for a rehearing of the Court's December 21, 1998 order, which was denied by the Sixth Circuit Court of Appeals on February 26, 1999. This

present appeal, filed on April 19, 1999, is timely brought under 28 U.S.C. Section 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTORY AUTHORITIES INVOLVED

42 U.S.C. Section 1983

U.S. Const., Amendment XIV, Section 1

STATEMENT OF THE CASE

On May 5, 1998, the Plaintiff filed an action entitled "Professional Negligence Complaint" in the United States District Court for the Southern District of Ohio, Western Division at Dayton, alleging that he was an heir of the estate of Geneva D. McClain, and as such, entitled to certain properties which the decedent owned. The decedent had named attorney Richard C. Scharrer as her executor in her will, and Richard C. Scharrer, in return, retained attorney James L. Jacobson, of Pickrel, Schaeffer & Ebeling Co., L.P.A., to assist in the administration of the estate. The properties in which the Plaintiff claimed an interest were ultimately foreclosed, and the impetus for the Plaintiff's suit was the Plaintiff's failure to receive funds from the decedent's estate.

On May 8, 1998, Defendant Scharrer moved to dismiss the Plaintiff's complaint under Fed. R. Civ. P. 12(B). Instead of responding to the merits raised in Scharrer's motion, Petitioner, on May 21, 1998, moved to strike

Scharrer's motion to dismiss. On May 26, 1998, the magistrate judge filed his report and recommendation to overrule Petitioner's motion to strike, and to grant Scharrer's motion to dismiss. Also on May 26, 1998, Petitioner filed an amended motion to strike Defendant Scharrer's motion to dismiss. Thereafter, on June 5, 1998, the Plaintiff filed objections to the magistrate's report while on June 10, 1998, Defendants Pickrel, Schaeffer & Ebeling Co., L.P.A., and James L. Jacobson also moved to dismiss the Petitioner's complaint. Both parties consented to magistrate jurisdiction pursuant to Fed. R. Civ. P. 73(B) and 28 U.S.C. Section 636(c).

Petitioner then filed a motion for summary judgment on June 19, 1998, which the magistrate considered additionally as a memorandum in opposition to Defendants, James L. Jacobson and Pickrel, Schaeffer & Ebeling Co., L.P.A.'s motion to dismiss. On July 15, 1998, the magistrate entered his decision and order dismissing this case without prejudice due to the Petitioner's failure to state a claim upon which relief can be granted. The magistrate observed that the Petitioner's complaint was captioned as a suit for "professional negligence" and that the Plaintiff failed to state a claim for relief under 42 U.S.C. Section 1983 for deprivation of property without due process of law, because none of the Defendants were "state actors." The Court additionally held that negligence by a state actor which deprives a person of property would not constitute a violation of the Fourteenth Amendment, and for that reason as well, would not be actionable under Section 1983. After numerous objections and motions for relief from judgment, the Court reiterated its order of dismissal on September 8, 1998 and September 17, 1998.

Petitioner attempted his appeal to the Sixth Circuit Court of Appeals on October 5, 1998.

ARGUMENT

This case advances none of the criteria identified in Supreme Court Rule 10, and for that reason, as well as the reasons that follow, this Court should deny jurisdiction on the Petition for Certiorari.

1. Did the District Court properly dismiss Petitioner's complaint for lack of jurisdiction?

Contrary to the Petitioner's assertions, there was no directed verdict entered into this case. The District Court, after reviewing Petitioner's complaint for professional negligence, simply noted that the Plaintiff was seeking to recover for property losses allegedly resulting from the negligent administration of the Estate of Geneva McClain. The Court noted that the executor of an estate, while admittedly acting under the supervision of the Probate Court, is nonetheless, not an actor who acts "under color of state law." *Hagerty v. Succession of Clement*, 749 F.2d 217 (5th Cir. 1984), cert. denied, 474 U.S. 968 (1985). Similarly, the Court noted that "an attorney for an executor is even less like a state actor than the executor." *McClain v. Scharrer*, Case No. C-3-98-182, decision and order dismissing case without prejudice, July 15, 1998. Thus, Petitioner's complaint was even more specious as pertains to Respondents, James L. Jacobson and Pickrel, Schaeffer & Ebeling Co., L.P.A., who acted as the attorneys for Executor Scharrer. See, *Polk County v. Dodson*, 454 U.S. 312, 102

S. Ct. 445, 70 L. Ed. 2d 509 (1981). For those reasons, Petitioner's complaint failed to state a claim on which relief could be granted either under the Fourteenth Amendment or 42 U.S.C. Section 1983. Dismissal of the Petitioner's complaint was thus proper.

2. Did the District Court properly dismiss Petitioner's complaint after affording Petitioner numerous opportunities to state an actionable claim?

Petitioner had every conceivable opportunity to present any claims the Petitioner may have had in this litigation. What the Petitioner continues to overlook is that he does not have any claims cognizable under the Fourteenth Amendment or 42 U.S.C. Section 1983. Petitioner has failed to state a claim upon which relief can be granted in the District Court, and has failed to timely appeal the District Court's entry of dismissal to the Sixth Circuit Court of Appeals. As such, Petitioner has failed to preserve any questions for this Court's review other than the untimeliness of the action in the Sixth Circuit Court of Appeals.

As the Sixth Circuit Court of Appeals correctly dismissed Petitioner's appeal, this Court should decline jurisdiction.

CONCLUSION

This Court should decline jurisdiction as this case advances none of the objectives of Supreme Court Rule 10. Petitioner has failed to articulate any legitimate or compelling issues for this Court's review, and simply alleges general dissatisfaction with the results received in the District Court and Court of Appeals, to which no timely appeal was perfected.

Dated: June 9, 1999

Respectfully submitted,

PICKREL, SCHAEFFER and EBELING

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APPENDIX

28 U.S.C. § 1331 Federal question:

> The District courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 1983 Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United Sates or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

MARK McCLAIN,

Plaintiff, : Case No. C-3-98-182

-vs- District Judge
Algenon L. Marbley

RICHARD S. SCHARRER, et al., Magistrate Judge
: Michael R. Merz

Defendant.

DECISION AND ORDER DENYING MOTION TO STRIKE; REPORT AND RECOMMENDATIONS

(Filed May 26, 1998)

This case is before the Court on Motion to Dismiss of Defendant Richard S. Scharrer (Doc. #2) and Plaintiff's responsive Motion to Strike (Doc. #4).

Plaintiff brought this action *pro se* to recover for property losses suffered as the result of what he alleges was professional negligence by Defendant Scharrer. Defendant Scharrer seeks dismissal under Fed. R. Civ.P. 12(b)(1) on grounds this Court lacks jurisdiction of the subject matter of this case.

Federal courts are courts of limited jurisdiction; they are empowered to hear only those cases which are within the judicial power of the United States as defined in the United States Constitution and as further granted to them by Act of Congress. Therefore there is a presumption that

a federal court lacks jurisdiction until it has been demonstrated. *Turner v. President, Directors and Co. of the Bank of North America*, 4 U.S. 8, 4 Dall. 8, 1 L. Ed. 718 (1799). Facts supporting subject matter jurisdiction must be affirmatively pleaded by the person seeking to show it. *Bingham v. Cabot*, 3 U.S. 382 (3 Dall. 382), 1 L. Ed. 646 (1798). The burden of proof is on the party asserting jurisdiction if it is challenged. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83, 56 S. Ct. 780, 80 L. Ed. 1135 (1935). A federal court is further obliged to note lack of subject matter jurisdiction *sua sponte*. *Mansfield, C. & LM. Ry. v. Swan*, 111 U.S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 126 (1908); *Sumner v. Mata*, 449 U.S. 539, 548, n.2, 101 S. Ct. 764, 770, n.2, 66 L. Ed. 2d 722 (1981).

In his Complaint, Plaintiff named several possible bases for jurisdiction, including 28 U.S.C. §1331 (Complaint, Doc. #1, ¶1). Defendant Scharrer attempts to respond to all possible bases; but in his Motion to Strike, Plaintiff makes clear he is relying on federal question jurisdiction under §1331 because he is making his claim under 42 U.S.C. §1983 for deprivation of property without due process of law.

42 U.S.C. § 1983, R.S. § 1979, was adopted as part of the Act of April 20, 1871, and reads, as amended:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The statute creates a cause of action sounding essentially in tort on behalf of any person deprived of a constitutional right by someone acting under color of state law. *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978). The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. *Wyatt v. Cole*, 504 U.S. 158 (1992). In order to be granted relief, a plaintiff must establish that the defendant deprived him of a right secured by the U.S. Constitution and the laws of the United States and that the deprivation occurred under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 155 (1978). The principal inquiry in determining whether a private party's actions constitute 'state action' under the Fourteenth Amendment is whether the party's actions may be 'fairly attributable to the state.' See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The Supreme Court has set forth three tests to determine whether the challenged conduct may be fairly attributable to the state in order to hold the defendants liable under section 1983. These tests are: (1) the public function test, *West v. Atkins*, 487 U.S. 42, 49-50 (1988); *Flagg Bros. v. Brooks*, 436 U.S. 149, 157 (1978); (2) the state compulsion

test, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970); and (3) the symbiotic relationship or nexus test, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-26 (1961). These tests are reiteated [sic] in *Ellison v. Garbarino*, 48 F. 3d 192, 195 (6th Cir. 1995).

A private person may act under color of state law if he is a willful participant in a joint activity with the State or its agents. *United States v. Price*, 383 U.S. 787, 794 (1966). There must be a sufficiently close nexus between the state and the conduct challenged so that defendant is treated as a state actor and defendant's act is treated that of the state. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), *quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). But the "[Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721 (1961), *quoting Shelly v. Kraemer*, 334 U.S. 1, 13 (1948).

Plaintiff's Motion to Strike makes clear that he sues Mr. Scharrer as executor of the estate of Geneva McClain. Although the executor of an estate acts under the supervision of the Probate Court, an executor does not act "under color of state law." *Hagerty v. Succession of Clement*, 749 F. 2d 217 (5th Cir. 1984); *cert. denied*, 474 U.S. 968 (1985). Because Mr. Scharrer, acting as executor, was not acting "under color of state law," however damaging his acts may have been to Plaintiff's property interests, they are not "state action" for which he can be sued under the Fourteenth Amendment and §1983.

Accordingly, Plaintiff's Motion to Strike is DENIED and I recommend that Defendant Scharrer's Motion to Dismiss be GRANTED and the Complaint be dismissed without prejudice for lack of subject matter jurisdiction. Because federal jurisdiction is a difficult matter to learn even for lawyers, I recommend that Mr. Scharrer's motion for sanctions be DENIED.

May 22, 1998.

/s/ Michael R. Merz
Michael R. Merz
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

MARK McCLAIN, Plaintiff(s),	:	Case No. C-3-98-182
-vs-		Magistrate Judge
RICHARD S. SCHARRER, et al.,	:	Michael R. Merz
Defendant(s).	:	

JUDGMENT IN A CIVIL CASE

(Filed Sep. 8, 1998)

JURY VERDICT: This action came before the Court for a trial by jury. The issues have been tried and the Jury has rendered its verdict.

X **DECISION BY COURT:** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Objection (Doc. #20), of the Plaintiff Mark McClain, construed as a Motion for Relief from Judgment, is DENIED.

Date: September 8, 1998

Kenneth J. Murphy, Clerk
Clerk

By: /s/ Karla S. Evans
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

MARK McCLAIN,

Plaintiff, : Case No. C-3-98-182

-vs- Magistrate Judge Michael R. Merz

RICHARD S. SCHARRER, et al.,

Defendant. :

DECISION AND ORDER DENYING PLAINTIFF'S OBJECTIONS

(Filed Sep. 8, 1998)

This action is before the Court on Plaintiff's Objection (Doc. #20) to the Court's Decision and Order of July 15, 1998, dismissing this case without prejudice (Doc. #14).

Plaintiff, who is proceeding *pro se*, styles his paper an "Objection." Because there was unanimous consent to plenary magistrate judge jurisdiction under 28 U.S.C. §636(c), the objection procedure set forth in Fed. R. Civ. P. 72 is not applicable. Additionally, the Decision and Order objected to were entered July 15, 1998, so that the time for making objections (ten days) has long since passed. However, the courts are obliged to construe *pro se* pleadings liberally, especially in civil rights cases such as this one. Following *Haines v. Kerner*, 404 U.S. 519 (1972), the allegations of a *pro se* complaint are subjected to "less stringent

standards than formal pleadings drafted by lawyers." *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). Accordingly, the Court will treat Plaintiff's motion as a motion for relief from judgment under Fed. R. Civ. P. 60(b) and consider it on the merits.

Plaintiff's Complaint alleged that Defendant Richard Scharrer as executor of the estate of Geneva McClain and James Jacobson of Defendant Pickrel, Schaeffer & Ebeling as attorney for the estate acted negligently in their professional capacities, thereby depriving Plaintiff of property interests deriving from the estate. Plaintiff brought his action under 42 U.S.C. §1983, claiming that each Defendant was acting under color of state law. While the federal courts have subject matter jurisdiction over §1983 actions under both 28 U.S.C. § 1331 and 1343, a plaintiff must actually allege a §1983 claim before the Court can take jurisdiction of the case. It does not matter that a Plaintiff puts the label "§1983" or "state action" on his case; he must actually allege facts which come within §1983.

In the Decision and Order, the Court held that Plaintiff had not actually asserted a claim under §1983 because (1) executors and attorneys for executors do not act under color of state law, citing *Hagerty v. Succession of Clement*, 749 F.2d 217 (5th Cir. 1984), *cert. denied*, 474 U.S. 968 (1985), and (2) even if Messrs. Scharrer and Jacobson were state actors, Plaintiff only alleges they acted negligently, but §1983 requires something more than negligence, citing *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

Mr. McClain's Objections are articulate and contain numerous citations of law. However, none of the cases he cites holds that an executor acts under color of state law or that negligence is sufficient under §1983. It is certainly correct, as he argues, that a person need not be a state officer to have acted under color of state law and that a person may act under color of state law when he or she exercises some delegated power traditionally associated with sovereignty. But acting as executor and the private practice of law in advising an executor are not such delegated powers.

Accordingly, the Objection, construed as a motion for relief from judgment, is DENIED.

September 5, 1998 /s/ Michael R. Merz
Michael R. Merz
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

MARK McCLAIN,

Plaintiff, : Case No. C-3-98-182

-vs- Magistrate Judge

RICHARD S. SCHARRER, et al., : Michael R. Merz

Defendant. :

ORDER DENYING SECOND MOTION FOR RELIEF FROM JUDGMENT

(Filed Sep. 17, 1998)

This case is before the Court on Plaintiff's Motion for Relief from Judgment allegedly under Fed. R. Civ. P. 60(a) (Doc. #23). For the reasons already set out in this Court's Order of September 8, 1998, Plaintiff's Motion for Relief from Judgment is not well taken. The Court continues to adhere to its position that neither of the Defendants acted under color of state law.

Accordingly, the Motion for Relief from Judgment is DENIED.

September 16, 1998. /s/ Michael R. Merz
Michael R. Merz
United States Magistrate Judge